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No. 149

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IN THE

Supreme Court of the United States

October Term, 1967

WAYNE DYKE, ED McKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.

REPLY BRIEF FOR PETITIONERS

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1. Respondent contends (Brief in Op. 7-9) that the court below relied upon an independent state ground in disposing of the "search and seizure" issue: that there was sufficient evidence to convict even without the fruits of the search. This contention is misplaced for two reasons.

(a) Respondent has misread the opinion below. The court below did not find sufficient evidence to convict absent the seized gun and bullets.

The "search and seizure" issue was "assignment of error 3" in the court below. In its disposition of that issue (Appendix to petition, pp. 21-22), the court below nowhere indicated that there was sufficient other evidence to convict. Indeed, it is perfectly clear that, without the unlawfully seized gun and bullets, there was *no* evidence linking petitioners to the shooting. The court below *could* not (as in fact it *did* not) find that there was other evidence sufficient to convict.

The language to which respondent points appears in the court below's disposition of "assignment of error 4." That issue involved the admissibility under State law of certain expert ballistics testimony. (Because it was solely a State ground, that issue is not advanced to this Court.) It was with respect to this ballistics evidence that the court below said "even without this evidence, sufficient evidence is contained in the record to fully justify the Chancellor's finding" (Appendix to petition, p. 22).

Thus, contrary to the brief in opposition, the court below did *not* rely upon the sufficiency of the remaining evidence in disposing of the "search and seizure" issue.

(b) Moreover, even if the court below *had* so relied, its decision would still be reviewable by this Court. Whether the introduction of evidence obtained by means of a Constitutional violation constitutes harmless error is itself a federal question, ultimately determinable by this Court. *Chapman* v. *California,* 386 U.S. 18 (1967). It is clear, we think, that in this case the admission of the illegally seized evidence prejudiced petitioners; indeed, as we have noted, without the gun and bullets there was no substantial evidence linking petitioners to the shooting.

2. Respondent advances only one argument to support the *correctness* of the decision below on the search and seizure issue: that there was "reasonable cause" to believe that petitioners were involved in the shooting (Brief in Op. 4-7). The simple answer is that that was not the basis for the decision below. The court below justified the search solely as incident to a lawful reckless driving arrest:

> "It is the law of this State that, within reasonable limits, the police may search *pursuant to a lawful arrest* the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If

> so, evidence of *other unlawful conduct* produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct." (Appendix to petition, pages 21-22; emphasis supplied.)

In any event, as we showed in the petition (page 10), the search in the circumstances of this case contravened controlling decisions of this Court, whether viewed as incident to the arrest or as based on probable cause.

3. Respondent asserts that the jury trial claim, based on the Fourteenth Amendment, is not properly here because petitioners phrased their claim in the court below in terms of the jury trial provisions of the Bill of Rights, rather than the Fourteenth Amendment (Brief in Op. 9-12). While an early decision of this Court held that reference to a Bill of Rights provision, rather than to the Fourteenth Amendment, would preclude review of the latter issue, *Chapin* v. *Fye*, 179 U.S. 127 (1900), that decision has been widely criticized, and a more liberal policy appears to have governed more recent decisions of this Court. *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590, 598-99 (1954); *Gibbs* v. *Burke*, 337 U.S. 773, 779 (1949). See also Stern and Gressman, *Supreme Court Practice* 83 (2d Ed. 1954); Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.) 149 *et. seq.* (cited with approval in *Braniff Airways, supra*).

This Court's increasing equation of Fourteenth Amendment rights with those of the first eight Amendments has led to a widespread practice of discussing state-action cases in terms of the first eight Amendments. See, e.g., *Stoner* v. *California*, 376 U.S. 483, 488 (1964); *Ker* v. *California*, 374 U.S. 23, 30-34; *Bond* v. *Floyd*, 385 U.S. 116, 131-37 (1966); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967).

While, to be sure, it would have been better practice to refer specifically to the Fourteenth Amendment below, it is clear that in this case, at least, the State court fully under-

stood that petitioners were not relying literally on the Bill of Righs to the exclusion of the Fourteenth Amendment. The court below did not reject the federal Constitutional claim on the ground that the Bill of Rights is applicable only to federal courts (as respondent suggests, Brief in Op. 12). Rather, the court below declared: "It is completely clear that the result we reach in this case would be the same under Federal jurisdiction" (Appendix to Petition, pp. 20-21).

Accordingly, the contention that the denial of jury trial violated the Fourteenth Amendment was adequately raised in the State courts, was passed upon, and is properly here.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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